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No. 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

Amici's interest in this case is in preserving the constitutional role of the press in accessing, disseminating and critiquing the nation's laws and monitoring how the government applies those laws to individual citizens. *Amici* urge this court to grant *certiorari* and determine whether the Transportation Security Administration has improperly withheld from the people and the press the text of rules that regulate public conduct.

SUMMARY OF ARGUMENT

The Constitution contemplates a crucial role for the press in accessing, disseminating and critiquing the laws of the United States. *Amici* urge the grant of *certiorari* in this case due to its implications on the constitutional duty of a free press to notify and inform the public of what the law is.

The framework Congress has developed for the Transportation Security Administration's ("TSA") use of sensitive security information ("SSI") allows the executive agency to unconstitutionally withhold the content of laws from the press and the public.

The Transportation Security Administration's identification requirement constitutes a generally applicable law to which the public should have access. Government-imposed rules dictating when a person can board a commercial airliner make up part of the rules regulating public conduct.

Amici argue the text of the laws of our nation constitutes a core of information the public has an absolute right to access and disseminate. While the public may not have access to every piece of information relied upon by the government in drafting security directives, citizens must be privy to the content of the rules the government mandates they follow.

In a nod to this foundational principle of our constitutional system, this Court has universally, if in some places implicitly, recognized the role of the free press in facilitating access to the letter of the law in subject areas ranging from criminal procedure to administrative and copyright laws.

Finally, though Congress recently adopted new rules for disclosure of secret information, those rules will not mandate the openness required for an operative democracy.

ARGUMENT

I. The Text of the Nation's Laws Constitute a Constitutional Core of Information That Cannot Be Withheld From the Public.

This court should grant certiorari and review Mr. Gilmore's case to determine the crucial question of whether sensitive security information policies are so sweeping that they allow the Transportation Security Administration to cloak directives regulating public conduct under the guise of information policy. *Amici* contend they do and the Supreme Court should step in to bring clarity to an issue that has seen a fundamental precept of American democracy sacrificed to a bureaucratic desire for secrecy.

No areas of civic knowledge are more crucial to self-government than the content of government laws and regulations and the administration of justice. The press has an inextricable role to play in informing the public in these areas. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press…to play an important role in the discussion of public affairs."). That role cannot be usurped by an executive agency that unilaterally withholds from public scrutiny the text of its rules that directly impact the lives of millions of Americans.

While the press and the public have congruent rights to government information, courts have repeatedly recognized the reality that representatives of the media more frequently exercise that access and thus serve as a vital conduit of governmental information. *See e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) ("Instead of acquiring information about trials by firsthand word of mouth from those who attend, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the

public."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.").

As such, when an executive agency enacts and enforces a directive while simultaneously withholding its text from the public whose conduct is regulated, the agency violates foundational concepts upon which this country is built. Simply put, freedom of the press as conceived by the Constitution cannot coexist with secret law. *See Houchins v. KQED*, 438 U.S. 1, 14 (1978) ("The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.").

A. Congress's Statutory Framework for the Transportation Security Administration's Use of Sensitive Security Information Results in the Agency Promulgating Regulations That Constitute Secret Law Unavailable to the Public.

Congress has conferred upon the Transportation Security Administration virtually unchecked authority over information policy, which has resulted in the agency enacting a directive that regulates citizens' actions but simultaneously is withheld from their view. *See* 49 U.S.C. 114(s). The law empowers the Transportation Security Administration to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security" if the Transportation Security Administration decides that disclosing the information would "be detrimental to the security of transportation." *Id.*

The Transportation Security Administration has branded this unclassified material it withholds from the public as "sensitive security information." In its regulations, the agency sets out various categories of information that constitutes sensitive security information. *See* 49 C.F.R. § 1520.5. At the end of the list, the agency includes a catch-all: "any information not otherwise described in this section that TSA determines is SSI." 49 C.F.R. § 1520.5(b)(16). The Transportation Security Administration may distribute sensitive security information, but only to persons with a "need-to-know." 49 C.F.R. § 1542.303(f)(2)

The Transportation Security Administration has taken this broad mandate and run with it. Court decisions, press accounts and government reports all confirm the agency's abuse of its ability to restrict access to unclassified information it deems "secret." *See e.g.*, *Gordon v. FBI*, 390 F.Supp.2d 897, 900 (N.D. Ca. 2004) ("Defendants have offered no justification for withholding such innocuous information."); Sara Goo, *TSA Faulted for Restricting Information*, WASHINGTON POST, October 10, 2003, at A11 ("The Transportation Security Administration is muzzling debate of security initiatives by labeling too many of the agency's policies and reports as too sensitive for public dissemination, according to pilots, flight attendants and consumer advocates."); and GOVERNMENT ACCOUNTABILITY OFFICE, CLEAR POLICIES AND OVERSIGHT NEEDED FOR DESIGNATION OF SENSITIVE SECURITY INFORMATION 7 (2005) ("In addition to lacking written guidance concerning SSI designation, TSA has no policies and procedures specifying clear responsibilities for officials who can designate SSI.") *available at* http://www.gao.gov/new.items/d05677.pdf (Last visited November 1, 2006).

And while the press is able to document some of the Transportation Security Administration's misuse of sensitive security information, the larger story – the text of rules

regulating public conduct the agency is promulgating – goes unreported as journalists are unable to penetrate the agency-erected wall a "sensitive security information" designation constitutes.

There can be no doubt that the Transportation Security Administration's identification requirement constitutes a law generally applicable to the public. Government-imposed rules dictating when a person can board a commercial airliner make up part of "the regime that orders human activities and regulations through systematic application of the force of politically organized society." BLACK'S LAW DICTIONARY 900 (Bryan A. Garner ed., West Publishing 2004) (1891).

People who need to fly in this country must comply with the Transportation Security Administration's identification law, which, as shown by Mr. Gilmore's experiences, may or may not, in fact, require travelers to show government-issued photo identification.

Under the current scheme, whenever sensitive security information is invoked, the contours of the law are unknowable to the public and the press. Without any mechanism to learn the content of the underlying directive, there is no way for the press to accurately publicize – let alone analyze – the precise requirements commanded of the general public. Cut off from the content of the law, the press becomes nothing more than an agent of propaganda that mimics the dictates of government. Further, it is antithetical to the idea of a free society for citizens to merely take the government's word on what the law is. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'") *quoting Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Though *Lanzetta* and *Papachristou* address the vagueness of criminal statutes, the salient point here is that the text of the law, however unclearly written, was available to the citizens to scrutinize. Mr. Gilmore and other members of the public have no chance to fully understand a law, whether criminal or administrative, that they cannot see.

B. While Public Access to Certain Government Information Used to Craft a Law Can Be Curtailed, Access to the Text of the Law Itself Is Absolute.

In advocating access to the Transportation Security Administration's identification law, *amici* do not purport to go where the courts have not – namely to suggest that the First Amendment gives the press "an unrestricted license to gather information." *Calder v. IRS*, 890 F.2d 781, 784 (5th Cir. 1989).

The issue here is not the gathering of sensitive national security-implicating information. Instead the issue is the ability of a free press to report the contents of legal requirements citizens must comply with in order to fly on an airplane. Even though the First Amendment right to access government information is not unlimited, access to the text of the law must be.

As an initial matter, executive agency officials, and reviewing judges, are frequently called upon to distinguish between generally applicable law that regulates public conduct, which must be disclosed, and information collected by the government that does not regulate conduct, which may be kept hidden in certain narrow circumstances.

In *Corker v. Bureau of Alcohol, Tobacco & Firearms*, the Court of Appeals for the District of Columbia Circuit withheld from public view a Bureau of Alcohol, Tobacco and

Firearms personnel manual because the contents were "not concerned with regulating the behavior of the public." 670 F.2d 1051, 1075 (1981). The court made clear that disclosure would have been mandated had the manual contained more than mere "investigative techniques" for the "internal use" of agency personnel. *Id.* at 1073. "There is no attempt to modify or regulate public behavior only to observe it for illegal activity," the court wrote. *Id.* at 1075. See also *Cox v. Dep't of Justice*, 601 F.2d 1, 5 (D.C. Cir 1976) (Information can be withheld under FOIA exemption only if it "does not purport to regulate activities among members of the public … [or] set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.") and *Cueno v. Schlesinger*, 484 F.2d 1086, 1092 (CADC 1973) ("It is particularly important that information which is in effect substantive law not be concealed beneath a mass of other material.").

The framers of the Constitution recognized the distinction between information used to create the law and the law itself when they nailed the windows shut to keep the public from hearing the debates of the Constitutional Convention. *See North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 210 n.6 (3rd Cir. 2002).

After the convention, authors of the Federalist papers and other journalists and commentators of the day did not rely on an executive summary of the Constitution to inform their opinions on whether it should be ratified. Members of the press praised and critiqued the proposed Constitution's precise language (or lack thereof, in the case of the Bill of Rights). When it came to text of the law of the land, the framers recognized the press and the public were always on a "need-to-know" basis.

C. Courts Routinely Recognize Unrestrained Public Access to the Content of Laws as the Logical Truism Underpinning Every Area of the Law.

This Court has continually recognized unrestrained public access to the law as a logical underpinning in every legal context, ranging from criminal procedure to administrative and copyright laws.

The precise holdings in the following cases do not explicitly articulate a right to access the law. This is hardly because such a principle does not exist, but almost certainly because courts felt that such a fundamental precept need not be stated.

1. The Public's Presumptive First Amendment Right of Access to Criminal Court Cases Would Be Rendered Meaningless Without Public Access to the Law the Government Applies to Individuals.

This court, in a series of cases, has firmly established the presumptive First Amendment right of public access to criminal courts. *See e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("Press-Enterprise II"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S 555 (1980). Underlying this right of access to the courtroom is the unarticulated, yet universal, precept that the public would be able to access the law being applied in these forums of justice.

That Mr. Gilmore does not face criminal charges in this case does not alter the calculus when determining whether he and the press covering his case ought to have access to the law being enforced against him. As the court pointed out when granting the Riverside Press-Enterprise access to a preliminary court hearing in California, it is immaterial to the

question of access that the proceeding in question "cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury." *Press-Enterprise II*, 478 U.S. at 12.

It would render the meaning of all right-of-access cases absurd if the press could attend a court hearing but simultaneously be cut off from the law and thus have no way of determining whether justice was properly delivered. The United States does not conduct show trials.

Allowing the public's surrogate, the press, access to the text of the law ensures a watchdog is overseeing the government's application of the law when regulating an individual's behavior, both inside the courtroom and out.

"[A] claim to access cannot succeed unless access makes a positive contribution to this process of self-governance." *Press-Enterprise I*, 464 U.S. at 518 (Stevens, J., concurring).

Press access to the law is more than "a contribution" to the process of self-governance; it is its underpinning.

2. The Administrative State Would Be Constitutionally Unpalatable if Unelected Executive Agency Officials Were Allowed to Shield From Public Scrutiny Directives Enforced Against Citizens.

Administrative law jurisprudence also provides a rich vein of precedent for the proposition that the citizens must be able to access the laws of their government.

The need for a Federal Register offers an example of this country's distaste for secret law. The Federal Register was born on March 6, 1936, in direct response to the ill-effect that

inaccessible law manufactured by the burgeoning executive administration wrought on American democracy.

In *Panama Refining Co. v. Ryan*, the Supreme Court prodded President Franklin Roosevelt's administration and Congress to develop a way to put the public on notice as to what laws the executive branch was enacting. 293 U.S. 388 (1935).

The Panama Refining Company sued to enjoin enforcement of certain requirements expected of the company enacted pursuant to the Petroleum Code. The case made its way to the Supreme Court before the parties and the courts learned that the provision the company was suing over had in fact been repealed by an executive order.

Justice Cardozo, in dicta of his dissenting opinion, levied the harshest indictment of an administrative system that allowed such secrecy.

"One must deplore the administrative methods that brought about uncertainty for a time as to the terms of executive orders intended to be law" *Panama Refining Co.*, 293 U.S. at 434 (Cardozo, J., dissenting).

Commentators of the era also decried the lack of transparency in the administrative system with calls for the creation of a mechanism to catalog and distribute the non-penal laws fashioned by executive agencies.

"[A]part from criminal liabilities, the everyday affairs of the citizen are hedged about by a multitude of requirements based solely on some administrative pronouncement." Erwin Griswold, *Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 203 (1934). "There should ... be no need to demonstrate the importance and necessity of providing a

reasonable means of distributing and preserving the text of this executive-made law." *Id.* at 198

With the invention of a "sensitive security information" regime that allows for binding laws to be shrouded from public view, the legislative and executive branches have taken a step back to the era before the Federal Register, when the public was at the mercy of secret administrative pronouncements. The development is an unwelcome one for journalists seeking to keep the public informed about the law, and repugnant to the Constitution.

3. Even Copyright Law Mandates That Publishers Need Unfettered Access to the Law to Ensure the Public Has Unhindered Access.

Copyright law further illustrates the need for publishers to have a free hand in accessing the law so that it may be distributed to the public.

Some of the nation's early publishers sought exclusive rights to publish the laws being developed in the burgeoning legislatures and courts. Courts stepped in with rulings that firmly established that the law belonged to no single person or publisher, and that all citizens had equal rights to access and publish the law.

"It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public." *Nash v. Lathrop*, 142 Mass. 29, 35 (Mass. 1886). *See also Wheaton v. Peters*, 33 U.S. 591, 593 (1834) ("No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court: and the judges of the court cannot confer on any reporter any such right."); *Building Officials & Code ADM v. Code Technology*, 628 F.2d 730, 736 (1st Cir. 1980)

(referring to "a necessary right freely to copy and circulate all or part of a given law for various purposes."); and *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866) ("The materials for such publication are open to the world. They are public records, subject to inspection by everyone, under such rules and regulations as will secure their preservation.").

This important principle of copyright law reflects how constitutionally inapposite it is to deny publishers, including news media publishers, the ability to report on the text of the law.

II. Congress's Recent Attempt to Rein in the Transportation Security Administration's Unchecked Ability to Create Secret Law Does Not Create Any Mechanism for the Press or the Public to Uncover the Text of the Law.

Congress's latest pronouncement on the use of sensitive security information does not cure the constitutional infirmities of the Transportation Security Administration's practices. *See* Department of Homeland Security Appropriations Act of 2007 § 525, Pub. L. No. 109-295, 120 Stat. 1355 (2006). Three provisions of the law ostensibly open the sensitive security information vault, but they fail to offer any relief to Mr. Gilmore so as to moot his current grievance. *Id.*

First, under this new law, the public and the press will remain in the dark for three years before the Transportation Security Administration is required to justify the continuing necessity for a piece of information's sensitive security information designation. *Id.* at § 525(a)(2)

After three years, the Transportation Security Administration can unilaterally declare that the sensitive security information in question falls into one of a dozen vague categories and

continue the disclosure exemption. *Id.* Three-year-old information that does not fall into one of the protected categories can still be blocked from disclosure if an agency official simply articulates a "rational reason" for its continued secret designation. *Id.* at § 525(a)(2)(A)

While a sunset clause of this nature may be appropriate in the case of classified information that loses its confidential character with the passage of time, the same cannot be said for a set of legally binding rules – the text of the law itself cannot be embargoed.

Second, the press and the public should not be required to ask the government for the law as a necessary prerequisite to its release. Under the new statutory framework, the continued necessity of sensitive security information will be reviewed only "when a lawful request is made to publicly release a document containing" sensitive security information. *Id.* at § 525(a)(1).[2] This procedural step requires either omniscience or dumb luck on the part of the requester, and is hardly equivalent to the kind of check and balance system necessary for sensitive security information.

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[2] This language is from the provision that states the continuing necessity of a sensitive security information designation will be made upon request at any stage of the document's life cycle, including when it is less than three years old. Department of Homeland Security Appropriations Act of 2007 § 525(a)(1), Pub. L. No. 109-295, 120 Stat. 1355 (2006). After a piece of information becomes three years old, it "shall be subject to release upon request unless," as described supra, the sensitive security information falls into one of the enumerated categories or the Transportation Security Administration articulates a rational reason for its continued sensitive security information designation. *Id.* at (a)(2). Relevant to the argument here is that a requester must *ask* the Transportation Security Administration to review sensitive security information before propriety of the designation will be reviewed and the possibility of disclosure can exist.

Finally, the new law's provisional disclosure exception to certain government-approved civil litigants would neither vindicate Mr. Gilmore's constitutional claims nor would it aid the free press's ability to report the text of the law. *Id.* at § 525(d). Journalists must not be required to initiate a lawsuit in order to determine what laws apply to citizens.

Even if initiating litigation were a permissible prerequisite for the press to acquire otherwise secret law, journalists could not reveal to other citizens what they had learned. Anyone who publicizes the content of a Transportation Security Administration-promulgated law acquired through civil litigation is subject to a $50,000 fine for each disclosure to an "unauthorized person." *See* 49 C.F.R. § 1520.9

Therefore, the new regulations do not cure the constitutional violations constituted by the Transportation Security Administration's use of sensitive security information. More importantly for *amici*, the new law offers no hope for the press to uncover secret law.

CONCLUSION

Congress, in reaction to the horrific airline hijackings of September 11, 2001, has given the Transportation Security Administration virtually unchecked discretion to withhold information from the American public. But in its zeal for secrecy, the Transportation Security Administration has sidestepped the Constitution, concealing the content of the law from the press and the public. *Amici* do not question the intentions of the government, only the ill-effects that come with the denial of access to the text of the laws by which we are governed.

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Mr. Gilmore's petition for a writ of *certiorari* should be granted.

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